

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>RAMON MOLINAR</b>	)	
Claimant	)	
	)	
VS.	)	Docket No. 155,675
	)	
<b>IBP, INC.</b>	)	
Respondent	)	
Self-Insured	)	

**ORDER**

Claimant requested review of the Award dated February 12, 1996, entered by Administrative Law Judge Jon L. Frobish. Appeals Board Member Gary Korte recused himself from this proceeding and Bryce A. Abbott of Wichita, Kansas, was appointed Appeals Board Member Pro Tem.

**APPEARANCES**

Stanley R. Ausemus of Emporia, Kansas, appeared on behalf of the claimant. Craig A. Posson of Dakota City, Nebraska, appeared on behalf of the respondent.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

**ISSUES**

The Administrative Law Judge awarded claimant benefits based upon a 5 percent permanent partial general disability. Claimant requested the Appeals Board to review the issues of nature and extent of disability, specifically (1) whether claimant is entitled to a higher functional impairment percentage; and (2) whether claimant is entitled to a work disability in excess of his percentage of functional impairment. These are the only issues before the Appeals Board on this review.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments of the parties, the Appeals Board finds and concludes that the Award by the Administrative Law Judge should be modified. The Administrative Law Judge found claimant entitled to benefits based upon a 5 percent permanent partial general disability and denied the claimant's request for a work disability. The Appeals Board finds that claimant is entitled to benefits for an 8.5 percent permanent impairment of function and a work disability of 48.5 percent permanent partial general disability.

Claimant reported a personal injury by accident on May 10, 1991. At that time, he complained of an injury to his back and pain in both legs. It appears that claimant was off work approximately one week before he returned to work in a light-duty position. After returning to work in a light-duty position, claimant continued to seek medical treatment from several physicians, including Eustaquio O. Abay II, M.D., who recommended a myelogram with contrast.

The claimant previously had an MRI performed on May 15, 1991. That MRI was positive for a herniation of the disk at L5-S1. A second myelogram and a CT scan were performed on August 26, 1991. Immediately following the myelogram, claimant developed complaints of headaches which is a common side effect of a myelogram. The uncontroverted medical notes from Dr. Abay indicate that the patient was reassured that the condition should resolve with time and that if the headaches persisted for more than four or five days, additional medical treatment would be considered. It should be noted at this point that claimant does not speak English and there is confusion in the record as to whether claimant or his wife understood that they should recontact Dr. Abay's office if the headaches persisted. The uncontroverted medical records indicate that on August 29, 1991, claimant's wife contacted Dr. Abay's office and indicated that claimant continued to have severe headaches. He was told to drink lots of fluids and a work release was mailed to the respondent indicating that claimant would be released to return to work on September 9, 1991. During the period between the August 26, 1991, myelogram and September 9, 1991, claimant experienced extreme headaches with nausea.

Mrs. Molinar testified that she was afraid that Mr. Molinar would lose his job and for this reason she personally called in sick for him on September 9, 1991, and again on September 10, 1991. She testified that she told the automated reporting service

maintained by the respondent that claimant was still sick, could not work, and would be in as soon as he got better. Mrs. Molinar testified that her husband still had a headache and was confined to bed and unable to return to work on September 11, 1991. She said she called in on this day and, after reaching the automated service, someone picked up the telephone and told her not to bother to call in anymore because as of September 11, 1991, her husband had been terminated. Doug Bolton, Personnel Manager for the respondent, testified that claimant was involuntarily terminated due to unexcused absences.

Claimant received an Award in his favor on February 12, 1996. At the time of the regular hearing, claimant was unemployed and had not been employed since his termination by the respondent. Likewise, all treating and examining physicians had placed permanent restrictions upon claimant's activities in the work place. Claimant has a sixth-grade education and does not speak English.

There were four permanent impairment of function ratings given by various physicians. The impairment ratings were as follows:

Dr. C. Reiff Brown	-	5 percent
Dr. Phillip R. Mills	-	7 percent
Dr. Nathan Shechter	-	12.5 percent
Dr. Aly Mohsen	-	12 percent

Additionally, the parties have stipulated to a vocational report from Don E. Vander Vegt. It was Mr. Vander Vegt's opinion that Ramon Molinar's ability to perform work in the open labor market had been reduced by 60 percent because of the permanent limitations placed upon him by the various physicians as a result of his injury. He was also of the opinion that claimant's ability to earn comparable wages in the open labor market had been reduced by 37 percent. Applying the formula approved by the court in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990) to the percentages in Mr. Vander Vegt's uncontroverted vocational report results in a finding that claimant has incurred a work disability of 48.5 percent.

There is no evidence in the record that claimant refused to work or intentionally removed himself from the labor market, such as would require a denial of work disability under Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

Respondent challenged claimant's entitlement to a work disability by arguing that the claimant had not demonstrated an inability to perform work in the open labor market due to his placement in a light-duty position before his termination. Additionally, respondent argues that the claimant's termination arose from several violations of the employer's attendance policies. It is recognized that a claimant can be denied a work disability if the claimant's termination was not related to the injury suffered by the claimant but was, instead, related to violations of the employer's attendance policy. These cases include Perez v. IBP, Inc., 16 Kan. App. 2d 277, 826 P.2d 520 (1991) and Jose Morales

v. Dold Foods, Inc., Docket No. 175,362 (1995). These cases, while factually similar, can be distinguished. Here, there is no persuasive evidence that claimant intentionally remained outside the work force. He was not subject to a company wide layoff as in Lee v. Boeing Co. - Wichita, 21 Kan. App. 2d 365, 899 P.2d 516 (1995). In the present case, claimant was off work to travel to Wichita, at the request of his employer, for an invasive medical test. This myelogram resulted in commonly recognized side effects of nausea and intense headaches. The uncontroverted evidence in this case is that claimant continued to have problems with nausea and headaches and continued to notify his employer of those medical problems. Respondent in this case is more experienced than most employers in the medical management of workers compensation claims. Claimant's continuing complaints of headaches and nausea should have been an indication of the development of complications secondary to medical treatment for a work-related injury. Whether the effects of the complications of this medical treatment for a work-related injury were temporary or permanent is irrelevant. Following the injury, claimant was compliant with medical treatment and continually complained of physical problems. He was temporarily accommodated in a light-duty position until he left work to undergo medical tests. As a result of those medical tests, he became ill and missed additional work. It appears from the record that there were attempts to notify the employer of the complications resulting from the medical testing and that claimant intended to return to the work place as soon as he was physically able. Furthermore, the record does not establish respondent would have made the light-duty position available for claimant on a permanent basis. Neither does the record establish that claimant would be physically able to perform the duties of that light-duty position on a permanent basis.

It is claimant's burden to persuade the trier of facts by a preponderance of the credible evidence that claimant's position on the issue of work disability is more probably true than not true. In this case, the Board finds that the claimant has produced evidence sufficient to rebut the presumption of no work disability. The diagnosis in this case ranged from a herniated disk to ligamentous instability of the lumbosacral spine secondary to a work related accident. L5-S1 radiculopathy was noted by more than one physician. There was also a suggestion of chronic pain syndrome and signs of depression and anxiety secondary to long-term pain with super-imposed chronic pain syndrome. Even Dr. Abay, who performed the myelogram, indicated that upon claimant's return to work on September 9, 1991, that claimant should be restricted from lifting, pulling or pushing over 30 pounds; no repetitive lifting over 10 pounds; no prolonged standing or walking; no excessive or repeated bending or twisting of the low back; no kneeling, squatting, stooping, or crawling; and no climbing. Dr. Abay's last notes in the record indicate that these restrictions were to be imposed for a four-week period of time and then would gradually be changed as the claimant developed some tolerance. Dr. Mohsen assigned similar restrictions, as did Dr. Shechter. There is substantial evidence in the record that these physical limitations would have a significant effect upon claimant's ability to perform work in the open labor market and to earn a comparable wage. Therefore, claimant should be awarded a permanent partial disability based upon a work disability of 48.5 percent.

The remaining findings and conclusions of the Administrative Law Judge as to issues not raised or argued by the parties are deemed appropriate and the Appeals Board adopts same as its own.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award by Administrative Law Judge Jon L. Frobish, dated February 12, 1996, shall be, and it is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Ramon Molinar, and against the respondent, IBP, Inc., self insured, for an accidental injury which occurred on or about May 10, 1991, and based upon an average weekly wage of \$369.90 for one week of temporary total disability compensation at the rate of \$246.61 followed by 414 weeks at \$119.61 or \$49,518.54 for a 48.5 percent permanent partial general bodily disability, making a total Award of \$49,765.15.

As of July 31, 1997, there is due and owing to the claimant one week of temporary total compensation in the sum of \$246.61 plus 323.86 weeks of permanent partial compensation at \$119.61 per week in the sum of \$38,736.89 for a total due and owing of \$38,983.50, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$10,781.65 shall be paid at \$119.61 per week for 90.14 weeks, or until further order of the Director.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with counsel is hereby approved.

Fees necessary to defray the expenses of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid direct as follows:

Susan Maier

Deposition of Brenda Lopez	\$ 71.60
Deposition of Shawn Dees	\$148.60
Deposition of Raquel Molinar	\$115.60
Deposition of Pam Moreno	\$130.60
Deposition of Hector Enriquez	\$ 51.60

Underwood & Shane

Deposition of Doug Bolton	\$195.40
Transcript of preliminary hearing	\$155.10
Transcript of continuation of preliminary hearing	\$128.70
Transcript of regular hearing	\$176.00

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July, 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

cc: Stanley R. Ausemus, Emporia, KS  
Craig A. Posson, Dakota City, NE  
Kenneth S. Johnson, Administrative Law Judge  
Phillip S. Harness, Director